(16,071.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 73.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

PATRICK L. SOLAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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a Pleas before the supreme court of Iowa, in a cause wherein Patrick L. Solan, plaintiff, was appellee and The Chicago, Milwaukee and St. Paul Railway Company, defendant, appellant.

Be it remembered that on the 30th day of January, 1895, there was filed in the supreme court of Iowa a printed abstract of the record, the same being in the words and figures following, to wit:

1 In the Supreme Court of Iowa, January Term, A. D. 1894.

PATRICK L. SOLAN, Appellee,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant. } At Law.

Appeal from Sioux district court—Hon. Scott M. Ladd, trial judge.

Geo. E. Clarke, attorney for appellant; Powers & Conway and W. D. Boies, attorneys for appellee.

Appellant's Abstract of Record.

On the 8th day of June, 1892, the plaintiff filed his petition in the above-entitled cause, as follows:

Petition.

The plaintiff for a cause of action against the above-named defendant, respectfully shows to the court:

I.

That the above-named defendant now is, and for more than a year last past has been, a corporation duly incorporated under,
2 and by virtue of the laws of the State of Wisconsin, and that its principal place of business is at the city of Milwaukee, in the State of Wisconsin, and that as such a corporation it is authorized to conduct a general railway business, carry passengers, freight, etc., and as such is a common carrier, and has been a common carrier during all of the hereinbefore-mentioned times.

II.

The plaintiff further shows that the said defendant, a corporation, now is, and for more than a year last past has been, authorized to transact and conduct its business aforesaid in the State of Iowa.

III.

The plaintiff further shows: That on or about the 6th day of January, 1892, this plaintiff entered into a contract with the defendant, whereby the defendant, for a valuable consideration,

agreed to carry cattle for this plaintiff from Rock Valley, Iowa, to the city of Chicago, in the State of Illinois, and the said defendant further agreed with this plaintiff to carry this plaintiff on its cars with said cattle from Rock Valley, in the State of Iowa, to the said city of Chicago, and the plaintiff further alleges: That at said time, and prior to said time, the said defendant had a railway extending from Rock Valley aforesaid to the city of Chicago.

IV.

The plaintiff further shows: That on or about the 6th day of January, 1892, the plaintiff aforesaid was riding upon the defendant's cars at Rock Valley aforesaid, under, and by virtue of said contract, and the plaintiff entered the caboose on said freight train at Rock Valley aforesaid, as a passenger of said defendant, and in charge of his said stock on said 6th day of January, 1892.

V.

That it then became, and was, the duty of the said defendant to exercise proper care and diligence in conveying this plaintiff from Rock Valley aforesaid, to the city of Chicago.

VI.

3 That after plaintiff entered said caboose, and became a passenger of said defendant, at a point between Boyden and Sheldon in Sioux county, in the State of Iowa, and while plaintiff was riding upon defendant's cars as aforesaid as a passenger, the said defendant, by its agents and servants, negligently and carelessly permitted one of the rails of said track to become weak, cracked, and out of repair, and carelessly and negligently propelled the car and caboose in which this plaintiff was riding as aforesaid, at a negligent and exceedingly rapid rate of speed, and in consequence of the carelessness and negligence of the said defendant in permitting its track rail to become out of repair, and in consequence of the negligent manner in which said freight was propelled, and the rate of speed under which it was negligently carried by the servants and agents of the defendant, the said rail broke, gave way, and derailed the said caboose and threw it from the railway track, at a point between Boyden and Sheldon aforesaid, and in consequence of said caboose becoming derailed and thrown from said track, by the carelessness and negligence of the defendant, this plaintiff, in attempting to jump from said caboose to save his life, was violently thrown from said caboose, and was greatly maimed, bruised, and injured, and was made sick, sore, and lame, and permanent and incurable injuries were inflicted upon this plaintiff in attempting to jump from said caboose, when in imminent danger of death as aforesaid, this plaintiff's right hip was cut to the bone, and was seriously bruised. The plaintiff's body, ribs, shoulder, collar-bone, and breast-bone were seriously injured, bruised, and maimed in said jump and fall, the plaintiff received internal injuries of a serious and permanent character.

VII.

That in consequence of such injuries the plaintiff was confined to his bed at Sheldon, Iowa, for three and a half weeks, and was under great expense and trouble, and suffered serious pain in the body and mind, and is still unable to perform heavy manual labor in consequence of such injuries.

VIII.

That by reason of the premises, the plaintiff has sustained
4 damages in the sum of four thousand five hundred dollars ($4,500) no part of which has been paid.

IX.

Wherefore, the plaintiff demands judgment, in his favor, and against the defendants for the sum of four thousand five hundred dollars ($4,500) with interest thereon from January 6, 1892, and the costs of this action.

POWERS & CONWAY,
Plaintiff's Attorney-.

(Duly verified.)

On the 15th day of November, 1892, the defendant filed its answer as follows:

Answer.

Comes now the defendant and for answer herein admits that it is a corporation engaged in carrying passengers, freight, etc., as a common carrier as charged in plaintiff's petition, admits that on or about the 6th day of January, 1892, the plaintiff herein entered into a contract with this defendant for shipping cattle from Rock Valley, Iowa, to Chicago, Ill., and that as an incident to said contract defendant agreed to carry plaintiff on its cars with said cattle from Rock Valley, Iowa, to Chicago, Ill., and defendant denies each and every allegation contained in plaintiff's petition and not herein specifically admitted.

The defendant further says that plaintiff contributed to his own injury and that plaintiff's own carelessness contributed directly to his said injury.

GEO. E. CLARKE,
Attorney for Defendant.

(Duly verified.)

And on the 16th day of January, 1893, the defendant filed an amendment to its answer as follows:

Amendment to Answer.

Comes now the defendant and by leave of the court first had and obtained, amends its answer heretofore filed by adding thereto the following:

Div. 2. Defendant further answering herein and for a separate

defense says that at the time of the injury mentioned and complained of in plaintiff's petition, the plaintiff was on the train of the defendant for transportation from Rock Valley, Iowa, to
5 Chicago, Ill., in connection with certain cars of stock shipped from said station to Chicago, Ill., by Wm. Marmiller under a written contract between said Wm. Marmiller and defendant, which among other things expressly stipulated "Eighth. That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of $500;" that in consideration of said clause in said contract the defendant entered into a contract for the transportation of said stock from Rock Valley, Iowa, to Chicago, Ill., for a less sum than its regular, usual, charges, which fact the owner and shipper of said stock and plaintiff all well knew at the time of the making of the said contract, and at the time plaintiff started in transit with said stock from Rock Valley, Iowa, to Chicago, Ill.; that said contract related exclusively to interstate transportation and constituted an interstate commerce transaction, and that plaintiff and the owner and shipper of said stock, having accepted the benefits of said contract, are now estopped from questioning its validity or disavowing the same; that at common law said contract is a valid and legal contract, and that sec. 1303 of the Code of Iowa is void and unconstitutional so far as said contract is concerned, as being an attempt to regulate and limit contracts relating to interstate commerce; that under and by virtue of the terms of said contract plaintiff is not entitled in any event to judgment herein to exceed the sum of $500.

Div. 3. And for further answer and by way of separate defense herein, plaintiff says that at the time of the injury mentioned and complained of in plaintiff's petition he was on defendant's train in transit from Rock Valley, Iowa, to Chicago, Ill., with two car-loads of stock shipped by Wm. Marmiller from said station of Rock Valley, Iowa, to Chicago, Ill., under a written contract between said Wm. Marmiller and this defendant, a portion of said contract being as follows: "Agents will not permit any but owners of live stock, or their *bona fide* employés, to pass free in charge of same and will refuse to pass any others without regard to passes permitted by the number of cars;" that plaintiff was not the owner of said
6 stock and had no interest therein and was not a *bona fide* employé of said Wm. Marmiller, the owner and shipper thereof; that at the time of the injury mentioned and complained of in plaintiff's petition he was unlawfully and fraudulently procuring himself to be transported from Rock Valley, Iowa, to Chicago, Ill., well knowing that he was not entitled to such transportation, and well knowing that he was not the owner or shipper of said stock, nor a *bona fide* employé of the owner or shipper; that defendant in receiving plaintiff on its train for transportation had no notice or knowledge of the fraud which the plaintiff was perpetrating upon it, and defendant says it is not liable for the injuries by plaintiff sustained while in the act of perpetrating said fraud by reason of said facts.

WM. HUTCHINSON,
GEO. E. CLARKE,
Attorneys for Defendant.

And afterwards on the 18th day of January, 1893, the plaintiff filed an amendment to his petition as follows:

Amendment to Petition.

Plaintiff for an amendment to his petition herein states: That the contract under which he was riding upon defendant's train at the time of the said injuries is hereto attached, marked "Exhibit A," and made a part hereof.

That under and by virtue of the terms of said contract, he entered said car and was so riding at the time of the injuries complained of, and as the person in charge of the two cars of stock shipped in the name of the Farmers' Bank of Rock Valley, Iowa, that said stock was in and of the said train at the time of said injuries.

The *the* said company and its employés in charge of said train were negligent in allowing the rail of the said defendant's track to be and remain in a broken and unsafe condition at the time of the alleged injuries; that they were negligent in running said train at a rapid and dangerous rate of speed over an unsafe and rough and uneven road, all of which they were doing, and such being the condition of the road at the time of said injuries; that by reason
7 of the said negligence of the defendant and its engineer and employés, and by reason of the unsafe and uneven condition of its said road and road-bed, the car or caboose in which plaintiff was riding, while so in charge of stock, left the rail and ran upon the ties of said road for a long distance at a very rapid and dangerous rate of speed; that after said train had so run for some distance with the caboose still attached to the said train, but upon the ties and off the rail, plaintiff jumped from said caboose while in rapid motion, believing at the time, as a reasonably prudent and cautious man, and exercising all reasonable care and caution of a reasonable and prudent man, both in his decision and in the act, that it was the only way to save his life and avert impending death; that in jumping from said car as aforesaid, plaintiff, without any fault or neglect on his part contributing to his injuries in any manner whatsoever, received and sustained severe and serious permanent injuries as enumerated in the original petition, and he also received and sustained a serious and permanent injury upon the head, which has seriously and permanently affected and injured his head and mind; that plaintiff has at all times since said injuries, and is now suffering great bodily and mental pain and anguish as a direct result of said injuries; that all of said injuries were caused by the negligence of the defendant solely, and without any negligence or fault on the part of this plaintiff.

In the original petition, where it is alleged that plaintiff shipped the stock, or that he was the owner of the same, he does not claim that he did so ship or own the stock only so far as the same was in his charge for the Farmers' Bank of Rock Valley, Iowa.

Plaintiff further alleges that at the time of signing said "Exhibit A," an exact duplicate was signed and retained by the said company's agent at Rock Valley, Iowa, and plaintiff now gives notice

to the defendant to produce the same upon the trial of said cause, to be used by plaintiff as evidence in the case, and unless you do so, he will offer the original of "Exhibit A" in evidence, or other and secondary evidence of the duplicate contract.

8 Wherefore, plaintiff demands judgment for ten thousand dollars and the costs of this action.

POWERS & CONWAY AND
W. D. BOIES,
Attorneys for Plaintiff.

"Exhibit A" attached to said amendment is as follows:

"EXHIBIT A."

Form 71.—Issue of March, 1889.

Chicago, Milwaukee & St. Paul Railway Company.

Limited Liability Live-stock Contract.

ROCK VALLEY, IA., STATION, *Jan.* 6, 1892. 18—.

Farmers' bank has delivered into the cars of said company C. C. C. C. 35 and 1939 of live stock of the kind as follows:

Cattle ML in car No. 35..... .....in car No.....
Cattle and hogs ML in car No. 1939.....in car No.....
.....in car No.....in car No.....
.....in car No.....in car No.... ..

Consigned to Wood Bros., destination U. S. yards, Ills.

Which said live stock has been received by said company for transportation over its lines from Rock Valley, Ia., station to U. S. Yards, Ills., station, upon the following terms and conditions, which are admitted and accepted by said Farmers' bank to be just and reasonable.

First. That the said Farmers' bank agrees to pay said company for the transportation of said live stock from Rock Valley, Ia., station to U. S. Yards, Ills., station:

On horses or mules.....per tariff.....
On cattle.....per.....
On hogs.....per.....
On sheep.....per.....

Subject to minimum or estimated weights as shown in the published tariffs of said company, and upon the condition that the liability of the company for any loss or damage for which it may be responsible shall not exceed the following agreed valuation:

If horses or mules, $100 each.
If cattle or cows, $50 each.
If hogs or calves, $10 each.
If sheep, lambs, stock hogs or stock calves, $5 each, but

9 not to exceed, in any case, $1,200 on a full car-load of any class of live stock.

Second. That the company shall not be liable as an insurer of the live stock transported under this agreement.

Third. That the company shall not be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, and smothering, nor for loss or damage arising from the condition of the animals themselves, or from their jumping from the cars, or from loading or unloading them.

Fourth. That if the stock shall pass over the road of another company to reach its destination, the company upon whose road any accident, loss or damage may occur, shall alone be liable therefore, and this company shall not be liable for any loss or damage thereto, or any delay in transportation, or delivery thereof by any connecting or succeeding carrier or company.

Fifth. That the company shall not be liable for damages occasioned to said stock by being delayed during its transportation, unless the same shall be caused by its gross negligence, and it does not agree to deliver said stock at destination at any specified time.

Sixth. That the owner or party in charge of said stock shall bear all of the expenses of feeding or watering said stock during its transportation.

Seventh. That the shipper has examined the car or cars in which said live stock is loaded and has accepted the same as being in proper condition for the transportation of said live stock, so far as the upright portion of the car or cars is concerned, that is: The floor, doors, and sides of the cars are in good condition, and he agrees that the company shall not be liable for any loss or damage occasioned by defects, either in the floor, door, or sides of said cars.

Eighth. That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in an amount exceeding the sum of $500.

Ninth. That all stock forwarded to Milwaukee must be unloaded at this company's stock yards and will be subject to yardage.

Tenth. That no claim for loss or damage to stock shall be valid, unless presented to the company in writing within 30 days after the same shall have occurred.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,
By C. W. JACOBS, *Agent.*

P. L. SOLAN,
Person in Charge of Stock.
FARMERS' BANK,
Shipper, Rock Valley, Iowa,
By V. J. VITGHUM.

Instructions to Agents and Conductors.

No passes will be given by agents at points, where live stock is loaded or shipped. Where parties are entitled to free transporta-

tion, this contract must be properly filled out in spaces provided on back hereof.

Agents will not permit any but owners of live stock, or their *bona fide* employés to pass free in charge of same, and will refuse to pass any others without regard to passes permitted by the number of cars.

Such entry of names of persons on back of this contract, will be conductor's authority for passing men in charge. When live stock is shipped to stations, the agents at which are not supplied with return passes, the agent can endorse on the back of contract, the name or names of men entitled under rules to be passed back free, giving names of stations from and to which they are to be passed, and conductors can accept such stock contract so endorsed, as authority for passing them, if offered within three days of such endorsement.

When stock contracts are to be used as return passes, agents must in all cases, stamp them with station stamp.

When live-stock contracts are used in this way, as return-stock passes, they must in all cases be taken up by conductors and sent in to Mr. R. S. Dousman, return-ticket agent, with their regular reports.

Agents must use due diligence to establish the identity of the parties applying for the return-stock passes as being the parties who actually accompanied the stock.

11 When live stock in car-loads originates at, and is destined to a point where there are no track scales, it must be billed on basis of medium weights provided for in the tariffs and classifications of this company, unless shipper's weights are greater, in which case it must be billed at the latter weights, subject to correction.

The same rule will apply where it is impossible from any cause whatsoever to weigh the car both loaded and empty.

J. H. HILAND,
General Freight Agent.

ROSWELL MILLER,
General Manager.

NOTE.—This contract will be executed in duplicate and both signed by shipper and agent. The original will be forwarded to H. P. Elliot, freight claim agent at Milwaukee, and the duplicate may be delivered to the shipper.

Chicago, Milwaukee & St. Paul Railway Company.

Limited Liability Live-stock Contract.

JAN. 6, 1892. 18—.

Nos. of cars, 35–1939.

Conductors will pass on same train with above-numbered cars from Rock Valley, Ia., to U. S. yards, Ills., the following-named parties, who are actualiy in charge of same, and who have signed their own names in ink.

P. L. SOLAN.

Parties whose signatures appear above are entitled under rules to pass in charge of live stock shipped under this contract.

C. W. JACOBS, *Agent.*

If under rules parties above named are entitled to return passes, this contract will be exchanged for such return passes, if presented to agent of C., M. & St. P. R'y at destination within time specified in such rules.

That afterwards on the 26th day of January, 1893, it was entered of record in open court, that the answer and amendment to
12 answer heretofore filed by defendant in this action should stand and be considered as the answer of defendant to the amendment to petition filed by plaintiff as well as to the petition of said plaintiff.

And afterwards on the 26th day of January, 1893, at the regular January term of said court, the cause came on for trial before the court and a jury, whereupon the following proceedings were had and evidence produced, offered and introduced, and objections made and exceptions taken as herein shown by bill of exceptions duly signed by the trial judge and by him certified to contain all the evidence introduced upon the trial of said cause and the objections thereto and the exceptions taken, and was duly filed in said court within the time allowed, and made a part of the record in said cause, and this abstract contains all the evidence introduced or given to the jury, and objections made and exceptions taken thereto.

Plaintiff's Evidence.

F. W. CRAM called and sworn for the plaintiff testifies as follows: Reside at Sheldon and have been a practicing physician and surgeon since 1878; am the local physician and surgeon for the Milwaukee road at Sheldon, Iowa; am acquainted with the plaintiff in this suit, had seen him before he received his injuries upon the Milwaukee road; attended him immediately after his injuries about the 6th of January, 1892; when I first saw him he was in a caboose upon the track about three miles west of Sheldon; didn't make a very careful examination there, but made a more careful examination after he was taken to Sheldon; so far as I was able to judge, he was wholly conscious when I saw him in the caboose; he appeared to be suffering pain, he was making loud complaints anyway; am acquainted with a man by the name of Brown who lives in Dakota who was injured at the same time, he was there in the caboose at the same time; only examined him for a few minutes at that time, then we removed him over to the baggage car and took him back to the Sheldon hotel as soon as we could; Mr. Solan was taken to the Arlington hotel and I made a further examination of his injuries after we arrived there;
13 the first noticeable wound was a scalp wound, a cut or tear that extended from just above the left ear, just at the edge of the hair up along the forehead to a point about where people usu-

ally part their hair, and from there off towards the top of the head; the cut was probably six inches long from one end of it to the other, in a sort of right angle; the skull-bone itself wasn't exposed; the skin and tissues covering the skull were laid over but the skull itself wasn't bared, the periosteum or the membrane which covers the bone was intact; it was not a cut wound, that is a wound made by a sharp instrument, and it would take a pretty severe blow to tear the scalp in that way and one would suffer considerable pain; the wound had no effect upon any other part of his body at the time any more than it had been bleeding quite freely and was paining him severely; the pain was in his head. I found another injury over the right chest, a bruise right at the upper and right corner of the breast-bone—at the junction of that and the collar-bone; the lung had evidently been injured from concussion, there was evidence of a lung perforation; of course the air escaped through this opening from the lung into the tissue underneath the skin; the skin was greatly puffed up as a result of that; he was suffering great pain from that injury. I found another injury along the crest of the right hip-bone; there was a bruise there where the skin was partially lacerated perhaps four or five inches in length; the skin wasn't completely cut through; the bone was evidently bruised; the wound didn't extend down to the groin, it didn't pass beyond the point of the hip in front; it wasn't a complete clean cut, it was more of a ragged bruise, it was a laceration rather than a cut; of course there would be a discoloration extending from that all down the hip and up on the side perhaps to the axillary about ten or twelve inches; the discoloration extended back from the hip nearly around to the spinal column perhaps six or eight inches, I didn't notice any rupture of the groin.

I attended the plaintiff about three weeks before he was able to leave the hotel and go to his home; he was confined to his bed nearly all the time, and had to be assisted whenever he was
14 moved in his bed; don't remember anything about any injury to the back; he usually made complaint about everything, guess he was sore all over; he spit up some blood afterwards; the results of that injury might be permanent or not, of course at that time it would be impossible for me to say whether they were going to be or not, nor can I tell now whether they will be or not; plaintiff might be affected from that injury in such a way as that in stooping over he would fall; should say that the results of the injury to his lung are not permanent, I think he has entirely recovered from that; so far as the final results are concerned the wound on the head was the most serious injury he sustained; there was nothing about the injury upon the hip that would produce any permanent disabling results; if he had been ruptured at that time it would probably have been a permanent injury, but I don't think there was any rupture there, never heard of one before; this spitting of blood before mentioned continued in the neighborhood of a week, it became gradually less after the first few days until it entirely disappeared; should say at that time that the plaintiff was very seriously hurt and suffered a great deal of pain for a while.

Cross-examination:

He suffered quite severe pain in the first week, but after that the pain became gradually less; think that he will entirely recover, but can't swear positively that he will entirely recover from that injury to the head, because there is a possibility of a chronic inflammatory affection which might follow an injury of that kind and not show itself as it hasn't had time at present to develop if there should be any difficulty of that kind, there is no other reason why I am unable to determine that question at the present time; don't see anything from the examination now that would indicate any future trouble; there is no fracture of the skull, neither can I find any bony growth there at present; if there should be any inflammatory processes going on in the inside we couldn't be able to discover it from an external examination, can discover no indications of that at the present time; the tear on the scalp wasn't as large as the palm of your hand; that injury to the lung was entirely cured before he left the hotel so far as I was able to discover, don't think there would be any permanent injury, it had fully healed at that time as near as I could tell; made a careful examination of his person at the time of the injury and discovered no rupture upon the abdomen, nor any ground to think such existed; find from an examination just now that there has been a small separation of the muscular fibers just at the top of the hip bone, it is not what I should call a rupture in the ordinary sense, it is what we technically call an inguinal, when he is lying down you don't see it at all, but if he coughs or when he stands on his feet then it bulges forward; it makes a little ridge perhaps as large as your thumb; if it is neglected it might become worse, but think that it can be kept so that it will be no worse than it is.

Redirect examination:

Some sort of support should be used to protect it; it is not what is technically called a rupture, it is a separation of the muscular fibers from their attachment to the bone; never heard of anything like this being called a rupture in any medical works; the matter that protrudes is something from the abdomen; there is a tendency to a little bony growth on the hip bone; these injuries would have a tendency to make the man lame, but don't think it would be dangerous, the lifting of course would hurt him some and might have a tendency to cause it to enlarge; at the examination just now when I touched him it appeared to hurt him.

FERDINAND SMITH testified as follows:

Reside at Alton, Iowa, have been a physician and surgeon for about six years; made an examination of the plaintiff a few days ago; discovered a rupture on his right side at the lower end of the scar on the hip; it appeared tender and sensitive when I was examining and feeling of it; it will always remain as it is; an injury of this kind would make a person lame as long as it isn't reduced, when he wears a truss to keep the protrusion in the abdomen then

it would be all right, a truss would have to be made specially
16 for it; there also seemed to be a bony growth on the ilium,
it might keep on growing or it mig-t remain stationary, it is impossible to say.

Cross-examination:

It is pretty hard to tell what caused this bony growth, it may have been from an injury to the periosteum, or it might arise from a small fracture, and to a certain extent will eventually become absorbed.

F. E. CRAM recalled for further cross-examination:
Think this bony substance near the end of the hip bone was probably caused by a small fracture of the bone, and this growth has followed that in the same way that a callous growth follows a fracture anywhere else; the probability is that it will become absorbed.

PATRICK L. SOLAN testified on his own behalf as follows:
Am the plaintiff in this case; am about 47 years old and reside north of Rock Valley in this county, have been a farmer all my life except during war time, have lived in Sioux county 22 years and over; I signed "Exhibit A" now shown me; took passage on the defendant's railway at Rock Valley, Iowa, on or about the 6th day of January, 1892, in charge of two cars of stock; "Exhibit A" was the contract between the company and myself; took passage upon this train some time between eight and nine o'clock at night; the two cars of stock of which I had charge was a part of the train upon which I was riding; it was a stock train; the conductor and brakesmen and James Brown and myself were riding in the caboose at the time of the injury, there were twelve or fourteen cars of stock and the caboose in the train; the accident occurred about three miles east of Boyden in this county; the train was running at the rate of 45 miles an hour, no less.

About five minutes before the car jumped the rails, I was laying down on a seat and I felt the car jolt and rock and when it jumped off the track on the ties it went rough, it run about 260 rods; jumped from the caboose while it was in motion; as soon as the rattle of the caboose commenced on the ties I went out on the platform and seen a big
stream of fire behind the caboose, I suppose made by the jar, I
17 looked ahead and couldn't see no engine, and then I went to get
off the south side and afterwards on the north side and finally went down on the lower step and dropped into the middle of the track; received the injuries described by Dr. Cram at the time I jumped from the caboose; when I jumped I was as careful as I could be; one of the brakemen jumped off before I did; was unconscious by jumping from this caboose; no part of the damages in this case have been paid by the company; the conductor helped me up after the accident; was taken into the caboose after the injury and afterwards into a baggage car and brought to Sheldon to the Arlington hotel; heard the conductor say he was two hours behind that night;

don't believe the brakeman applied the brakes; am not used to jumping from moving trains; was suffering severe pain when I regained consciousness; this pain lasted about a week; I couldn't get up without help for a week; have pain now in the small of my back and my shoulder-blade; was at the hotel under Dr. Cram's treatment for about two weeks and a half; there is pain in my head now from the wound on the head and whenever I catch cold there is pain; also have a pain in my breast from the hurt in the lungs; my hip is all right; never knew that I was ruptured until the other evening when the doctor examined me; my neck is stiff and there is a pain in my neck and the blood rushes up there when I stoop over and there is a kind of a rattling in my throat and I have spit up blood, but not a great deal, and I will be distressed when I lift anything; have a pension from the Government on account of the weakness of my eyes and sunstroke and the piles; have done some work such as shoveling coal since I was hurt a couple of times; am always lame and easily tired out.

(The plaintiff here offers in evidence "Exhibit A," being the shipping contract for the live stock of which plaintiff was in charge and on which he was riding at the time of the accident. A true copy of this contract is set out in "Exhibit A" of plaintiff's amendment to petition, see page 8 of Abstract.)

Cross-examination:

The only way I had of determining the rate of speed of the
18 train was by timing the telegraph poles by the watch; don't know just how many times I had done that; think the train stopped at Boyden; should think the wreck occurred not over five minutes after the train left Boyden; was sitting on the seat in the front part of the caboose when it left the track. I had not been using my watch that evening in timing the rate of speed; noticed the telegraph poles some but didn't pay much attention to them; couldn't see them very well. When the caboose went off the track I went to the rear end and shut my eyes and jumped in the center of the road. The doctor made his examination of me about three days ago; knew there was a small lump on my hip at that time, but did not know there was anything the matter there.

Q. Who did you make your arrangements to go to Chicago in charge of the stock with?

Objected to as incompetent, immaterial, irrelevant and secondary evidence and not proper cross-examination.

Objection sustained. Defendant excepts.

Redirect examination:

When I went back over the road to the point where the caboose left the track, I saw what looked to be a new rail; saw the old rail there; about eight inches of the end was broken off.

(For the purpose of asking one or two questions defendant makes the witness his own.)

I made the arrangement for going to Chicago in charge of this stock with Mr. Marmiller; I did not own any interest in any of the stock.

Cross-examination:

Q. You agreed with Mr. Marmiller, did you, to take charge of this stock and take care of it and oversee it from Rock Valley to Chicago?

Objected to as incompetent, immaterial, and not cross-examination.

Objection overruled. Defendant excepts.

A. Yes, sir.

There was no one else along to take care of the stock after
19 I left Rock Valley; two cars was all that I had anything to do with, the same ones named in the contract.

Plaintiff rests with the exception of the witness Brown whom plaintiff wishes to introduce if he shall arrive.

Defendant's Evidence.

WM. MARMILLER testified as follows:

Am in the business of buying and shipping stock at Rock Valley, Iowa; shipped the two car-loads of stock that Mr. Solan started with at the time of his injury; I shipped it in a bank's name.

Q. Now, did Mr. Solan have any interest in the stock?

Objected to as immaterial and not the best evidence.

The COURT: It will be sustained unless you care to show that he did have an interest; he has disclaimed any interest.

Mr. CLARKE: Well, probably that is true; he has disclaimed any interest.

Defendant excepts.

Mr. Solan was working for me that day; he helped me load the stock; some time before the accident Mr. Solan told me that he wanted to go to Chicago, and if I would let him go in when I shipped a couple of car-loads, and I said that I would just as leave let him go as anybody else; that was all the arrangement there was with him.

Cross-examination:

I gave Mr. Sloan directions as to taking care of the cattle and hogs on the trip and he was the only man who went along with them; they were shipped in the name of the Farmers' Bank of Rock Valley; the company's agent there knew they were my stock; he furnished these cars to me; I was not present when Mr. Sloan signed the contract (Exhibit "A"); I am in the habit of shipping in the bank's name, and there has to be a contract signed each time the agent signs.

Redirect examination:

When these other shipments were made sometimes a man went along and sometimes not; I owned that stock that was shipped through the Farmers' bank.

Recross-examination:

The bank furnished the money to buy the stock; Jacobs, the agent of the company, has been at Rock Valley probably two years and is there yet.

C. W. JACOBS testified as follows:

Am station agent for the Milwaukee Company at Rock Valley; I know the plaintiff in this case; that is my signature on the contract in evidence, Exhibit "A," and also my signature on the back of the contract; that is Mr. Sloan's signature on the contract just below mine; he signed it in my presence; I recollect the time of this contract and of the shipment of cattle by him; at the time of procuring this contract for his passage to Chicago he gave me to understand that he had an interest in the cattle that were being shipped; in substance he said that he owned one car of the stock, and I did not know to the contrary at the time this contract was made; at the time of endorsing him for passage on this contract, I believed those statements to be true; no one in the employ of the company except myself had anything to do with the making of this contract.

Cross-examination:

Mr. Sloan told me in substance that he did own the greater share of one car and that Marmiller was to fill it out for him; he told me this just before the stock was loaded; I think Mr. Sloan took this contract into his hands, but didn't read it over before he signed it; the Farmers' Bank of Rock Valley signed this contract up at their bank; I think I sent it up to them by Mr. Sloan; the greater portion of these cars belonged to Marmiller, and the cars were ordered by him, but I got the impression that Mr. Sloan still owned a part of the car of cattle; I saw Mr. Sloan helping load the stock; this contract is made on a printed form used by the company; different persons have gone into Chicago with cattle shipped for Mr. Marmiller in the name of the Farmers' bank.

21 Redirect examination:

No one has ever gone on in with his cattle except those who had an interest in them or were in his employ that I know of.

Q. Do you know, Mr. Jacobs, whether the freight on a car-load of cattle or stock would be higher than the rate charged in this form of contract, if it were what is called an unlimited contract?

Objected to as incompetent, immaterial, irrelevant, and I ask leave to cross examine the witness with reference to the rates of the company.

The COURT: You may answer that by yes or no.
Plaintiff excepts.

A. Yes, sir.
Q. Now you may state what the rate would be on a shipment other than on this contract?

Objected to as incompetent, immaterial, and irrelevant, and plaintiff asks leave to cross-examine the witness.
The COURT: You may cross-examine him.

Mr. BOIES:

Q. You may state whether or not your source of information with relation to these rates is in printed or written instructions in your possession as agent.
A. They are printed.
Q. And that is the only means you have of knowing the rates, is it not?
A. Yes, except there are special rates given upon applica- or something of that kind.
Q. In writing?
A. Yes, sir.

Plaintiff objects to the question as before and for the further reason as calling for secondary testimony.
Objection sustained. Defendant excepts.
(Defendant makes the following written offer at this time: Defendant offers to show by witness that the rate on stock from Rock Valley to Chicago on contracts other than Exhibit "A" would be full first-class rate, and that same is fifty per cent. higher than was charged on the stock in question under the contract in evidence.)
22 To which plaintiff makes the same objection as last above.
Objection sustained. Defendant excepts.

Z. D. HOLLENBECK testified as follows:
Live at Rock Valley, have been acquainted with Mr. Solan for about 12 years; knew about when he was injured something like a year ago; when he first came to town after being hurt he looked as if he had been badly staid with somewheres; he was thin and scrawny, but after a while he got over it and he looked as if he had his usual health since then.

A. J. WARREN testified:
Have lived at Rock Valley 12 or 14 years, have known Mr. Solan 15 or 20 years; knew of his being injured about a year ago; hav-n't noticed any particular change in him one way or the other in regard to his health.

OLE SEVERSON testified:
Live at Sheldon, Iowa; am section foreman for the Milwaukee Railway Company; have been section foreman a little over ten years; my section extends from Sheldon both ways, about three

miles and a quarter both ways; recollect the time the freight caboose was derailed the 6th of January a little over a year ago; the accident happened on my division about three miles west of Sheldon. Previous to the accident during the fall and winter, I had been over that part of the road every day, once or twice a day; the condition of the track and road-bed at the place where the accident occurred was good, the ties were good and solid; they were set in the road-bed solid; the rails at this place were good; they were fastened at the joints with a fish-plate bolted with four bolts. The rail that Mr. Solan says he saw is one I took out on the other side a little beyond where the accident occurred about a month after the accident and at that time was a sound rail; it was battered on the end; the grade is level where the accident happened; west of there it is downgrade for about a mile and a half.

Cross-examination:

I had been down to the Running Water branch shoveling show for a day or two before the caboose left the track; came back
23 the next night; there was a piece off the top of the rail that was taken out of the north side; took the rail out about a month after the accident; don't remember how long it was laying there; always take out a rail when I first notice there is anything the matter with it.

AUGUST LARSEN testifies as follows:

Was at Sanborn, Iowa, on January 6th, 1892; live at Sanborn, am working on the section on the Milwaukee road, and have been working for this company for about six years; remember the time that the freight caboose was derailed about three miles west of Sheldon; was out to the place of the accident that night to change the rail there; the rail was broken; there was something like two or three feet broken off; the ties along there were pretty fair, they were pretty solid when I drove spikes.

Cross-examination:

I went out to the place of the accident on the wrecking train; got there between 9 and 10; the rail that was broken was not loose, only the broken piece; the spikes in the long piece were solid; this short broken piece of the rail was out from the straight line of the track about five or six inches; took out the rail that was broken, unscrewed the fish-plates and put in a new rail; there was nothing the matter with the fish-plates that I could see.

A. D. NELSON testified as follows:

Live at Sanborn; am roadmaster for the Milwaukee road; my division extends from Spencer on the east to Marion Junction on the west; I have charge of the sectionmen and of the track and road-bed, looking after the condition, repair, grading, putting in ties, changing iron, graveling, and everything of that kind; I have been employed in the railroad business for 25 years in almost all branches of the business; have been roadmaster about ten years;

I recollect the broken rail west of Sheldon at the time Mr. Solan was injured; I was out on the Running Water branch that night; Mr. Severson, the foreman of the particular division where the accident occurred, was with me; he went out the day before
24 the accident; I am familiar with the track between Sheldon and Boyden; coming from Boyden east there is first an upgrade for a mile and a half, then a downgrade for about two miles further that comes down to or nearly to the point where the accident occurred that night; I know the point where the caboose left the rail; could tell it by the marks on the ties, the creases made by the flange of the wheel; you could see them very plain; it ran on the ties I should think between a half and three-quarters of a mile; the grade was just about level where the accident occurred; the track was in good condition at that place at that time; the ties and iron were in good shape, the material good; the ties were all sound and were bedded solidly in the ground; the track was in good, smooth shape; rails are supposed to break more easily in cold weather, as the frost separates the particles of iron, as we have more broken rails in winter than summer; I examined the broken rail; it was broken into four pieces; one was about ten inches from the end, which took it exactly to the end of the splice, and then there was another a little longer, and then another perhaps four feet long: and then the piece that was left in about 24 feet long; the rail was broken into four pieces, that is there were three breaks; they were all bright, new breaks; I could not discover any flaw or dull spot in the broken places at any point; I know William Switzer, the engineer of the train; have known him for five years; am acquainted with him as an engineer; I think he is a very careful man; I have rode with him a great many miles on the engine, and have always thought he was a very careful man.

Cross-examination:

I am still in the employ of the company; my duties as roadmaster call me from one end of the line to the other and back and forth continually; I usually ride on trains as they pass over the line, though I go over with the sectionmen pretty often; it takes more labor to keep the road-bed even with dirt than with gravel; if it should be a little uneven in the fall we have to put shimmies on it, that is put wedges under the rails; we never have to
25 shimmy up very much unless the frost moves it up; I was there a couple of days after the accident; I sent the rail to Chicago and made a report to the company of the condition of the rail; the whole rail was broken in four pieces; there were three of the short pieces and one long one; the road is straight all the way from Boyden to the place where the accident occurred; I have been roadmaster of this division for five years; freight trains usually run at the rate of from fifteen to twenty miles between Rock Valley and Sheldon.

A. D. NELSON, recalled, testified as follows:

The effect of a wheel striking a frosty rail after it has been broken would be a breaking off; every time that the wheel struck it it would break off a piece.

ADELBERT ROSEBROOK testified as follows:

I am a brakeman on the Chicago & Northwestern railway, and live at Hawarden, Iowa; have been engaged in the railroad business for five or six years; Jan. 6, 1892, I was in the employ of the Chicago, Milwaukee & St. Paul Railroad Company as a conductor on a freight train, and on the day of the accident my run was from Sanborn to Marion Junction and return; I was in charge of the train on which Mr. Solan was injured; we left Rock Valley going east that evening at about 7.15 p. m.; the plaintiff was on the train from Rock Valley east; we stopped at Hull about ten minutes and left there about 8 o'clock; the accident occurred about 8.30; I know the time because I sat with my watch in my hand at the time the caboose left the track; at the time the caboose left the track I should judge we were running at the rate of perhaps 25 miles an hour, we were not going over 30 miles an hour, and would hardly think it possible we were going that fast; the wheels and running gear of the train were in good condition; nothing wrong with the wheels of the caboose nor any wheel out of shape, if there had been I could have told it by the running of the train; have been acquainted with Wm. Switzer, the engineer, for the last five years; was on the train with him every few days; he was a good, careful, competent engineer: the track from Boyden east was straight, not curved, and was a pretty smooth track; a train could run on such a track
26 50 or 60 miles an hour, I should think, without any danger; we had on that train seven cars of stock and four of dead freight and the caboose; my rear brakeman on that train was Con. Kelleher, and the head brakeman was Frank Ulrick, and the fireman was a man by the name of Simpson; the first I knew there was anything the matter was when the caboose left the rail and struck the ties; it run on the ties about eleven telegraph poles when the draught iron pulled out of the caboose and it stopped, the caboose did not go over; when the caboose went off the rails, I ran out on the rear end and looked to see what was the matter; I discovered what was the matter, and tried to climb over the top of the caboose and get onto the train and it was pretty rough to do it, and was not able to, then I simply stood on the rear end of the platform until I got off finally before it stopped; the caboose went about two car lengths after I got off, then I ran into the caboose and saw there was nobody there, the stove was all right side up, and there was no danger from fire, then I started back down the track to see if I could find these men; back a little ways, perhaps eight or ten car lengths, I found both of the men laying about ten feet apart; helped them get in the coach and left the hind brakeman, Kelleher, in charge of them and I started for Sheldon with the train; went from where the caboose was to the engine, the distance was not to exceed half a mile; the grade from where the engine was west to the caboose was

a little down grade, then for a ways it was pretty near level, and then it was upgrade again; a train of this character on such a track as this with two brakes set and the engine shut off, if running at the rate of 25 miles an hour, would run about three-quarters of a mile before stopping; and a train of such a character and under the conditions mentioned going at the rate of 35 miles an hour, would run a mile or more before it could be brought to a standstill; a train of such a character and under the conditions before mentioned, running at the rate of 45 miles an hour, would run a couple of miles or more before it would come to a standstill; it could not possibly do so inside of a mile.

27 Cross-examination:

The fact of the caboose running on the ties might stop it a little bit quicker, but there wouldn't be much difference; I worked for the Milwaukee Company about five years prior to this accident, and was the conductor in charge of this train at the time of the accident; am now working for the Northwestern Company; commenced to work for it in July last; am a married man and live at Hawarden, Iowa; stopped at Hull the night of the accident; got orders at Hull; the time was about 8 o'clock p. m.; to the best of my judgment at the time of the accident we were not running to exceed 30 miles an hour; didn't see Solan and Brown and the brakeman come out on the platform; the caboose was going about 20 miles an hour when I got off; wasn't hurt at all; worked right along after that and lost no time; we usually run stock trains faster than ordinary freight trains; we were nearly two hours behind time that night; we always try to make up time; don't know what time that train left Sanborn for Chicago that night; we arrived at Sanborn that night with it at 11.15 p. m.; the train was due to leave Sanborn, I think, at 8.20 p. m.; had been running from Sanborn west on this division for five years prior to the accident and had been acting as conductor for three months of that time; quit the employ of the Milwaukee Company about the 1st of April; we have no rules with reference to the time that we may make with these trains between stations; think I know a good road-bed when I see it; think a road-bed can be in good condition without gravel; it would want to be surfaced up some to be a good road-bed; you don't want to lay the ties right in the ground without surfacing at all; gravel is supposed to be better for surfacing, it takes the ties better; it does not make any safer road than dirt; a road where the ties are laid in the dirt that is piled up as a grade would become uneven and out of repair more rapidly than it does when it is surfaced up with gravel.

FRANK ULRICK testified as follows:

Live at Sanborn, Iowa; am a brakeman in the employ of the Chicago, Milwaukee & St. Paul Railway Company, and have
28 been so employed for the last six or seven years, part of the time fireing and part of the time braking; was one of the brakemen on the train at the time the caboose was derailed and Mr.

Solan was injured, January 6, 1892; we left Marion Junction that day about 2 o'clock, I think, and Rock Valley about 7 o'clock or a little after; we stopped at Hull and got a car of stock; we did not stop at Boyden; was head brakeman; on the road between stations my place would be on the engine, and the place of the hind brakeman would be in the caboose; the first I knew of anything being wrong at the time of the accident was when I looked back and couldn't see any caboose lights; the engineer first noticed it and asked me if I could see any lights on my side, and I looked and couldn't see any; then I went on top of the train and couldn't see any lights there; we were running at that time I think at about 25 miles an hour; when I got on top of the train I went to the hind end to see what was the matter, and found that the caboose was gone; I then set up two brakes and stopped the train; the train run about a half mile from the time that I discovered there was no lights back there until it came to a standstill; there was nothing wrong with any other part of the train except the caboose.

Cross-examination:

I was a regular brakeman at that time; the conductor on this train wasn't my regular conductor that I had been with all the while; I was on the engine at the time of the accident; I couldn't see the lights because they were gone—that is, I couldn't see them; the fireman was attending to his work; the engineer had requested me before that evening to look for the lights; the head brakeman is supposed to look out for the lights without being requested every time; don't know how many times I had looked out for the lights that evening; I didn't feel any jerking from the effects of the caboose being off the track. To the best of my judgment that train at the time of the accident was not running at the rate of 35 miles an hour; after I looked out and saw there were no lights I reported the fact to the engineer; I then went right out on top of the
29 train to see if I could see any lights there, but couldn't see any; the caboose was detached from the main train at the time I got out on top of the train; I couldn't see any lights, so I set two brakes; at the time I set the two brakes I should think the train was going at the rate of about twenty miles an hour; the engineer had shut off a little because he couldn't see any lights; I think all he did was to shut off the steam; I don't think he reversed the engine.

HENRY SIMPSON testified as follows:

Live at Spencer, Iowa; am a fireman on the Chicago, Milwaukee & St. Paul railway, and have been so employed for nearly seven years; I was firing for Wm. Switzer at the time of the accident in which Mr. Solan was injured; have been acquainted with him for nearly seven years, and had fired for him nearly two years; I consider him a good, safe, competent man; we left Marion Junction for the east a little after 2 on the day of the accident; the first I knew anything was wrong with the train that night was when I heard

Switzer request the head brakeman to see if he could see the lights following the train on the caboose; I don't think the train was running at any unusual rate of speed; should say it was running about 25 miles an hour.

Cross-examination:

To my best judgment I don't think it was running as fast as 35 miles an hour at the time of the accident.

WILLIAM SWITZER testified as follows:

I live at Sanborn, Iowa; am a locomotive engineer in the employ of the Chicago, Milwaukee & St. Paul Railway Company; have been in the employ of said company about eleven or twelve years, and have been an engineer for about six years; was a fireman before I became engineer; I was the engineer operating the engine on the train that the caboose was derailed at the time that Mr. Solan was injured, Jan. 6, 1892; my run that day was from Sanborn to Marion Junction and return; we went west as No. 7 and came back as No. 10; we left Marion Junction on our return at about 2 o'clock, and left Rock Valley a little after 7 o'clock; we got
30 orders at Hull and left there at about 8 o'clock; the accident occurred about 8.30 o'clock; first mistrusted something was wrong when the head brakeman, whom I had told to look to the rear end, said he couldn't see any lights on the caboose; then I stuck my head out on my side and saw the red light, the cupola light we call it, weaving around on the outside of the lines of the train, then I shut the steam off; didn't reverse the engine because I didn't know what the matter was behind, and *and* I didn't want to reverse it and stop the train and have something come into me and smash the rest of the train up and perhaps kill somebody; I might only have part of the train and the rest would be following up and there would be a collision; think there were 10 or 12 cars in our train; at the time of the accident I should think we were running at the rate of from 25 to 30 miles, not to exceed 30; it was a straight track along where the accident occurred; didn't notice anything wrong with the running of the train, any jar of the engine, to call my attention to looking back; it is a part of my duty as an engineer to keep watch of the lights on the rear end of the train; am familiar with stopping freight trains; a train such as we had that night, running at the rate of 25 to 30 miles an hour, with the brakeman setting two brakes would run about a half mile after the steam was shut off, that is considering the lay of the ground and all.

Cross-examination:

I have been running as engineer west from Sanborn for about six years; I have engine 195; have pulled 19 loads with my engine from Boyden to Sheldon, that is the most I know of having; don't usually know how many loads we have; don't usually ask the conductor how many loads I have; go to the train and get my orders

and signal and go; my best judgment is that the caboose was not detached from the train when I looked back and saw the red light; when we are behind time with stock trains we try to make up a portion of it; we stopped at Hull long enough that night to take up one car, and when we had picked up that car, the conductor had orders for me; those orders were for No. 3, a mixed passenger and
31 freight train that runs west, and No. 10, our train, to go to Sheldon; we have no schedule time that we shall make with our train between stations; there are time-cards giving arriving and departing times at stations, but no schedules as to the speed you shall make between stations; our train is a stock train, she hauls other freight, but she is on the time-card as a stock train; they usually make better time with these stock trains than with ordinary freights; didn't reverse my engine for fear there might be a part of the train detached that would run into the front part; didn't know what was the matter back there; I generally reverse my engine whenever I think it is necessary and safe; of course it don't do an engine any good to reverse it, but I always do it whenever it is necessary; I may reverse an engine two or three times in one day, or it may not occur once in a month; I presume we were going at the rate of 25 to 28 miles at the time of the accident; presume the freight time on the Milwaukee line would figure out 17 miles an hour on most of the runs.

The defendant reads in evidence the following which is admitted as the testimony of the witness CON. KELLEHER, absent on account of sickness:

Said Con. Kelleher was the rear brakeman on the train of which plaintiff was traveling at the time of receiving his injury referred to in his petition filed herein.

That at the time the caboose of said train was derailed and thrown from the track said train was being properly and carefully handled and managed.

That said train was only running at the rate of 25 miles per hour, and that the same is a proper and reasonable rate of speed.

That said train was an extra stock train being a through train from the station of Rock Valley, Iowa, to the city of Chicago.

That a proper rate of speed for said train would safely be 40 miles an hour; and that the rules and regulations of defendant in reference to the rate of speed of such trains permitted them to run at as high rate as 40 miles per hour.

32 That said witness has had seven years' experience in railroading as a brakeman, fireman, and freight conductor and is familiar with the running of freight trains and with their proper and skillful handling and management.

That said train was being properly handled and skillfully managed at the time of said derailment.

That the engineer, Wm. Switzer, who was running said train, was a careful, skillful, prudent engineer, and that said witness has been acquainted with him for the five years last past and had frequently been on trains operated by said Switzer.

That he was well acquainted with said Switzer as an engineer

and knows him to be a careful, prudent, and skillful engineer and an engineer of good judgment.

That after the derailment said Kelleher was sent back west of the place where the derailment occurred to guard against other trains coming along said track and that he observed the place where the derailment occurred and that the track was in good condition with the exception of a broken rail and that said broken rail was the cause of said derailment.

That the ties in the track where said derailment occurred were sound and in place and were sufficient to hold the rails with, and were so placed in said track at said place that they were solid and were placed within about eighteen inches of each other from center to center.

That the said rail which broke showed that it was a fresh break and not caused by any flaw or other infirmity therein.

That at the time of the derailment the weather was exceedingly cold, being about 12 degrees below zero, and that said break was caused by the frost in said rail and the intense cold.

That intense cold has a tendency to render rails brittle and cause them to break, and that it is not possible by any system of inspection to discover or guard against the liability of rails to break in such cold weather.

A. ROSEBROOK, recalled, testified as follows:

I recollect, the evening of the accident, sending the rear brakeman, Con. Kelleher, back to guard the road against other
33 trains coming up; he had a lantern; he went back soon after the accident.

Cross-examination:

I couldn't say whether he took any torpedoes or not; there were some in the car; the caboose was pounding about considerably after it got onto the ties; I tried to get on top of the caboose and go onto the main train, but I had to give it up, the caboose was jumping around so hard; when the trucks went out from under the hind end of the caboose I thought it was tipping and I got off; at the time I got off I supposed Mr. Brown, Mr. Solan, and the brakeman had got off because I couldn't see them in the car; they were in there when I first went out onto the platform; I don't know whether the lights were out when I first went out onto the platform or not.

Defendant rests.

Plaintiff's Rebuttal.

PATRICK SOLAN, recalled, testified:

I didn't say anything to the station agent in regard to my owning any of the cattle; to the best of my knowledge I did not claim that I owned them.

Q. What portion of the stock had you sold to Marmiller on that day?

Objected to as not competent and not rebuttal.
Objection overruled. Defendant excepts.

A. I sold seven head.
Q. You had received pay for them that day before you left?

Objected to as incompetent, immaterial and not rebuttal.
Objection overruled. Defendant excepts.

A. I received $18 apiece.
Q. You had received you- money for them, had you?

Objected to as incompetent, immaterial and not rebuttal.
Objection overruled. Defendant excepts.

A. Yes, sir.

Plaintiff rests.

And thereupon the court instructed the jury as follows:

34 *Instructions to the Jury.*

GENTLEMEN OF THE JURY:

Par. 1. The plaintiff alleges that on or about Jan. 6, 1892, he entered into a contract with the defendant by which defendant was to carry plaintiff from Rock Valley to Chicago over defendant's line of railway; that defendant was in charge of stock shipped for the Farmers' Bank of Rock Valley, Iowa; that at such time plaintiff entered the caboose of defendant's freight train as a passenger and in charge of said stock; that at a point between Boyden and Sheldon, in this county, and while plaintiff was riding in said caboose, defendant permitted one of the rails of its track to get out of repair and propelled the train to which said caboose and cars of stock were attached at such an exceedingly rapid rate of speed that the said rail broke and the caboose was thrown from the track; that when the caboose was thrown from the rails, plaintiff, to protect himself jumped from the caboose and was injured upon his head and in his mind permanently; that his right hip was seriously injured, and also other portions of his body; that he has suffered great pain and has been damaged in the sum of $10,000, for which he asks judgment.

To the giving of par. 1 the defendant then and there excepted.

Par. 2. The defendant for answer admits that plaintiff took passage on defendant's road from Rock Valley to Chicago, and at the time of the injury mentioned in plaintiff's petition was on the train for such purpose. Defendant denies all the other allegations of plaintiff's petition and asks to go hence with its costs.

There are other matters in the pleadings which are not for your decision and hence are not submitted to you.

To the giving of par. 2 the defendant then and there excepted.

Par. 3. It appears from the evidence that the contract offered in evidence was entered into on the 6th day of January, 1892, by which the defendant agreed to carry two cars of stock from Rock Valley to Chicago, said stock being the property of Wm. Marmiller,

and shipped in the name of the Farmers' Bank of Rock
35 Valley, and that the plaintiff had charge of said stock for the owner thereof. It also appears that when the train having the plaintiff on board and with said stock was passing over defendant's railroad going from Boyden towards Sheldon, the caboose in which plaintiff was riding got off the rails and that plaintiff got off the caboose on the ground, and in so doing was injured. Now, it is claimed by plaintiff that defendant's agents and employés were negligent at the time and just prior to the accident complained of, by reason of running the train at a dangerous and unsafe rate of speed over the road in the condition it then was, and that the plaintiff was injured by reason thereof and without any fault on his part. The defendant denies this and claims that the train was running at an ordinary and safe rate of speed over said track and that the injury was not without fault of plaintiff.

To the giving of par. 3 the defendant then and there excepted.

Par. 4. You will first determine from all the evidence before you whether the defendant through its agents and employés were moving said train over the track at the time of the injury complained of at a dangerous and unsafe rate of speed. If you find that the defendant was moving said train at such time at a dangerous and unsafe rate of speed over said track, and if you further find that plaintiff was injured by reason thereof, and this without any fault on his part directly contributing thereto, then you will find for the plaintiff. If, however, you find that the defendant at such time was moving its train at a safe rate of speed over said road, or if you find that the injury did not result from a dangerous and unsafe rate of speed over said road, or if you find that the plaintiff by his own negligence directly contributed to the injury he received, then in any such event you will find for the defendant.

To the giving of par. 4 the defendant then and there excepted.

Par. 5. In determining whether the rate of speed at which the defendant was moving its train was dangerous and unsafe you may and should take into consideration that said train was a stock train; the length of the train, if shown, the condition of the track along where the injury occurred in so far as shown; the season of the year
36 and the condition of the weather at the time; the way the train and cars moved along said track in so far as shown; all the evidence bearing upon the speed at which said train was moving, and that at which stock trains are ordinarily moved, and that at which they may safely move; and all these in connection with all the evidence introduced, and all the facts and circumstances proven on the trial.

To the giving of par. 5 the defendant then and there excepted.

Par. 6. The defendant as a carrier of passengers was bound to exercise the highest degree of care for the safety and protection of the plaintiff while riding in its caboose over its road. The utmost degree of care which the human mind is capable of inventing is not required, but the highest degree of care and diligence which is reasonably practicable under the circumstances of the case is required. If the defendant's employés in moving the train along its road at

and just prior to the time of the injury complained of at the rate of speed they did at such place and over the road in the condition it was in at the time, in view of all the circumstances, were exercising all the care and diligence that was reasonably practicable with that kind of a train and over that road then the rate of speed was safe and you should so find. If, however, you find from the evidence before you that the defendant's employés in moving the train along its road at and just prior to the time of the injury complained of at the rate of speed they did move the same at such place, in view of all the circumstances and the condition the road was then in, were not exercising all the care and diligence that was reasonably practicable with that kind of a train and over that road and that said train was running and being moved at too great a rate of speed then such rate of speed in being too great and dangerous was unsafe, and defendant was negligent in moving said train at such rate of speed.

To the giving of par. 6 the defendant then and there excepted.

Par. 7. If you find that the defendant was moving its train at an unsafe rate of speed then you will determine whether the injury to plaintiff resulted therefrom and whether plaintiff in what he did was without fault. If you find from the evidence before you that the caboose got off the track by reason of the unsafe rate of
37 speed the train was moving, if it was so moving, and that plaintiff got out of the caboose and was injured in so doing, and that plaintiff in getting out of the caboose at the time and in the manner he did, acted as an ordinarily cautious and prudent man would act under like circumstances for his own safety; and if you further find that the defendant was negligent in the speed of its train as hereinbefore referred to, then plaintiff is entitled to recover herein and you should so find. If, however, you find from the evidence before you that plaintiff in getting off the caboose at the time and in the manner he did, did not act as an ordinarily cautious and prudent man would act under like circumstances for his own safety and that by failing so to do his failure therein directly contributed to his injury in any way, then he cannot recover herein and you should so find.

To the giving of par. 7 the defendant then and there excepted.

Par. 7½. Negligence consists in doing something that an ordinarily cautious and prudent man would not do under like circumstances, or in failing to do something that an ordinarily cautious and prudent man would do under like circumstances.

You are instructed that the provision in the contract limiting plaintiff's right to recover to five hundred dollars is not permitted by law and is void.

To the giving of par. 7½ the defendant then and there excepted.

Par. 8. If you find for plaintiff under the foregoing instructions, you should allow him such an amount, and such an amount only as will compensate him for the injuries he has received and the pain and suffering, if any he has endured, and in fixing such an amount you should take into consideration the nature and extent of such injuries; whether or not they are permane-t, and the pain, if any,

the plaintiff endured at the time of the injury and has suffered to the present time.

To the giving of par. 8 the defendant then and there excepted.

Par. 9. The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he was injured by reason of the negligence of the defendant and without any negligence on
38 his part directly contributing thereto; and if he has so done, return a verdict for plaintiff; if he has failed so to do, return a verdict for defendant. By a preponderance of the evidence is meant the greater weight of the evidence and not necessarily the greater number of the witnesses; that which on the whole when fully and fairly considered produces the stronger impression on the mind and is the more convincing as to its truth when weighed against the evidence in opposition thereto. You alone are to determine the weight of the evidence and the credibility of the witnesses, and in so doing you may and should take into consideration the demeanor of the witnesses on the stand, their feeling or bias, if any has appeared, their interest, if any, in the result of the suit; their relationship, if any, to the parties and the case; their knowledge and means of knowledge of the matters of which they have spoken; the consistency or inconsistency, reasonableness or unreasonableness of their several statements; and all these in connection with all the evidence introduced and facts and circumstances proven on trial.

To the giving of par. 9 the defendant then and there excepted.

Par. 10. The court hands you two forms of verdict. If you find for plaintiff, write the amount you allow him in verdict No. 1. If you find for the defendant use verdict No. 2. The verdict agreed upon have your foreman sign and return into court.

The court also hands to you five special interrogatories, each of which you should answer and have your foreman sign. After you have prepared your verdict and answered each interrogatory and had your foreman sign the verdict agreed upon and the answer to each interrogatory, then read over such verdict, interrogatories and answers thereto carefully and see that they are just as you agree that they shall be before returning the same into court.

To the giving of par. 10 the defendant then and there excepted, and to the submission of the fifth special interrogatory above mentioned to the jury the defendant excepts.

And on the 28th day of January, 1893, the jury returned into court their verdict as follows, to wit:

39 *Verdict No.* 1.

We, the jury, find for the plaintiff and fix the amount he is entitled to recover from the defendant at one thousand dollars.

W. J. SKEWIS, *Foreman.*

Int. 1. At and just prior to the time of the injury complained of was defendant's train moving at an unsafe and dangerous rate of speed over the road in the condition it then was in?

Ans. Yes.

W. J. SKEWIS, *Foreman.*

Int. 2. If your Int. 1 be "Yes," then was the caboose removed from the rails by reason thereof?
Ans. Yes.

W. J. SKEWIS, *Foreman.*

Int. 3. Was plaintiff negligent in getting off the caboose at the time and in the manner he did?
Ans. No.

W. J. SKEWIS, *Foreman.*

Int. 4. Was the defendant's track along where the injury complained of occurred in a reasonably safe condition?
Ans. No.

W. J. SKEWIS, *Foreman.*

Int. 5. Did Solan at and just prior to the time that he signed the contract introduced in evidence tell the defendant's agent, Jacobs, that he was at that time owner of part of the stock to be shipped?
Ans. No. (But had charge of the stock.)

W. J. SKEWIS, *Foreman.*

And thereupon the defendant filed its motion to set aside the verdict and special findings of the jury and grant a new trial, the same being in words and figures as follows, to wit:

Motion to Set Aside the Verdict and Special Findings of the Jury and Grant a New Trial Herein.

Comes now the defendant and moves the court to set aside the verdict and special findings returned by the jury herein and grant a new trial of this cause upon the following grounds:

1st. The same is contrary to the evidence and is not supported by the evidence.

2d. The verdict is contrary to the law.

3d. The court erred in each paragraph of its charge to the jury.

4th. The court erred in failing and refusing to charge the jury that under the contract introduced in evidence by the plaintiff, being Exhibit "A," the plaintiff was limited in his recovery to the sum of five hundred dollars.

5th. The court erred in refusing the defendant to prove by the witness Jacobs what the freight would be on the car-loads of stock of which plaintiff was in charge from Rock Valley, Iowa, to Chicago on an unlimited liability contract or on a contract other than the limited liability contract under which said stock was being shipped.

6th. The court erred in refusing the written offer of the defendant of the testimony proposed to be shown by the witness Jacobs.

7th. The court erred in submitting to the jury the fifth interrogatory.

8th. The court erred in overruling each of the objections made by the defendant during the introduction of evidence and trial of the case, as shown by the reporter's transcript of the same.

GEO. E. CLARKE,
Defendant's Attorney.

And on the 4th day of April, 1893, said motion for new trial was by the court overruled, and to which ruling of the court the defendant then and there excepted, and such exception was duly entered of record in said cause.

The court thereupon entered judgment in favor of the plaintiff and against the defendant for the amount of the verdict, one thousand dollars, and costs, to which the defendant excepted, and such exception was duly entered of record in said cause.

And thereupon the defendant filed in the office of the clerk of the district court of Sioux county, Iowa, its bill of exceptions in said cause, duly settled and signed by the Hon. Scott M. Ladd, judge of the fourth judicial district of Iowa, before whom said cause was tried, containing a certificate that the foregoing is all the evidence produced, offered or introduced on the trial of said cause, and all the objections made on said trial, and all the rulings on the same and the exceptions made to such rulings, and the instructions given to the jury in said cause.

41 And afterwards on the 29th day of August, A. D. 1893, the the defendant perfected an

Appeal

of said cause to the supreme court of Iowa, by serving a notice of appeal upon Powers & Conway, the attorneys for plaintiff, and upon M. J. Finch, clerk of the district court of Sioux county, Iowa.

Assignment of Errors.

And the appellant herein says there is manifest error upon the face of the record in this:

1. The court erred in overruling the defendant's motion for a new trial upon the second ground thereof.

2. The court erred in overruling the defendant's motion for a new trial upon the fourth ground thereof.

3. The court erred in overruling the defendant's motion for a new trial upon the fifth ground thereof and in refusing to allow the defendant to prove by the witness, Jacobs, what the freight would be on a car-load of stock of which plaintiff was in charge, from Rock Valley, Iowa, to Chicago, on an unlimited liability contract, or on a contract other than the limited liability contract under which said stock was being shipped.

4. The court erred in overruling defendant's motion for a new trial upon the sixth ground thereof, and in refusing the written offer of defendant of the testimony proposed to be shown by the witness Jacobs.

5. The court erred in par. 7½ of its charge to the jury.

6. The court erred in par. 8 of its charge to the jury in failing to limit the damages which the jury might allow to the sum of $500, as agreed upon by the parties to the contract of shipment.

42 Said cause was submitted to the said court on the foregoing record at the Jan'y, 1895, term thereof, and the court, hav-

ing duly considered the same, did, on the 31st day of May, 1895, file its decision in writing, the same being in the words and figures following, to wit:

43 Supreme Court of Iowa.

MAY 31, 1895.

"PATRICK L. SOLAN
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Appellant.

From Sioux district court—Hon. Scott M. Ladd, judge.

Action to recover for personal injuries alleged to have been caused by the negligence of the defendant in permitting one of the rails in its track to become weak, cracked, and out of repair, and in running the caboose in which plaintiff was riding at a negligent rate of speed, in consequence of which said caboose was derailed and plaintiff injured.

The case was tried to a jury, and a verdict and judgment in favor of the plaintiff for $1,000.00. Defendant appeals. The issues and facts sufficiently appear in the opinion.

George E. Clark, for appellant; Powers & Conway and W. D. Boies, for appellee.

44 GIVEN, *C. J.:*

I. Plaintiff was injured at a point in Iowa when being carried over defendant's road in a caboose attached to a freight train in which one or more cars of cattle in charge of plaintiff were being transported.

Plaintiff and the cattle were being carried under a contract between the owner of the cattle and the defendant for their transportation from Rock Valley, Iowa, to the Union stock yards in Illinois.

Said contract contains this provision:

"Eighth. That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in an amount exceeding the sum of $500."

The trial court instructed the jury that if it found for the plaintiff it should allow him such an amount as would compensate him for the injuries sustained.

Appellant contends that the court erred in not instructing that under the contract plaintiff was not entitled to recover, if at all, more than $500, and in this contention we have the only question presented on this appeal. We have no argument for appellee.

II. Appellant assumes that the court omitted to instruct that plaintiff could not recover more than $500, upon the theory that the part of said contract quoted above was void under sec. 1308 of the Code of Iowa. That section is as follows:

45 "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers

which would exist had no contract, receipt, rule, or regulation been made or entered into."

Appellant's contention is that as this was a contract for an interstate shipment, and as the power to regulate commerce between the States is exclusively in the Congress of the United States, said section does not apply.

It cannot be questioned but that this was an interstate shipment, and that Congress alone possesses power to regulate commerce between the States, but the inquiry remains whether said section, as applied to this contract, is a regulation of commerce.

Appellant concedes "that up to the present time your honors have refused to adopt the application and construction which is now contended for."

In the case of Hart *vs.* The C. & N. W. R'y Co., 69 Iowa, 486, the contract was for the shipment of horses from a point in this State to a point in another, and provided that no liability would be assumed by the carrier on the horses for more than $100.00 each. Question was made whether sec. 1308 was applicable, and it was contended "that the State has no power to place a restriction of that character upon the carrier who contracts for the transportation of prop-
46 erty from this State into another State or Territory."

The court says: "The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among States and a subject which, under the Federal Constitution, is within the exclusive jurisdiction of the Congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract, nor is any rule prescribed for his government respecting it. That it is within the power of the State to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enacted by the State in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the Supreme Court of the United States
47 in what are known as the Granger cases. See Munn *vs.* Illinois, 94 U. S., 113; Chicago, B. & I. R'y Co. *vs.* Iowa, *id.*, 155; Peik *vs.* Chicago & N. W. R'y Co., *id.*, 164." Appellant insists that upon authorities cited, and especially decisions of the Supreme Court of the United States, we should now announce a different holding.

Appellant cites Wabash, &c., R'y Co. *vs.* Illinois, 118 U. S., 557; Steamship Co. *vs.* Penna., 122 U. S., 326; Fargo *vs.* Minn., 122 U. S., 230, holding that the States have no power to fix rates for interstate shipments.

The case of Hart *vs.* Penna. R. R. Co., 112 U. S., is quoted from at length, and is largely relied upon as supporting appellant's contention.

That was an interstate shipment of horses under a contract wherein it was agreed that the carrier assumed a liability on the horses "not exceeding two hundred dollars each." The question was whether this clause in the contract was void as against public policy, not because of any statute, but under the common law. The court says: "It is the law of this court that a common carrier may by special contract limit his common-law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants."

The court, finding that it was "a limited liability live-stock contract and is confined to live stock," and that the rate of
48 freight was measured by the valuation expressed, announces this conclusion:

"The distinct ground of the decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, that the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

The reasoning of all the cases cited upon this subject is that the rates charged are based upon the valuation that the limitation as to value does not exempt from liability from negligence nor induce want of care, and is not therefore within the rule that declares contracts exempting from liability for negligence void. Appellee's cause of action is grounded upon the negligence charged, and the contract is for exemption from liability beyond the sum named for that negligence. The reasoning of the cases cited does not apply. Plaintiff was not being carried for a consideration based upon an agreed value of his life or limb.

No case is cited and none, we think, can be found wherein an agreement for exemption from liability from negligence in
49 the carrying of passengers has been sustained. See Ross *vs.* D. V. R. Co., 39 Iowa, 247. This contract is within the rule of the common law that declares such contracts void as against public policy and within the prohibition of sec. 1308. Surely neither the statute nor the common law that so declares can be said to "regulate commerce." To so declare is quite different from fixing rates or from forbidding the making of lawful contracts.

In our opinion, neither the common-law rule nor the statute to

which we have referred is, as applied to this contract, in any proper sense an attempt to regulate commerce.

This conclusion renders it unnecessary that we consider appellant's further contention that the United States has never adopted the common law.

Affirmed."

50 And on the same day, May 31, 1895, said supreme court rendered a final judgment in said cause, the same being in the words and figures following, to wit:

"PATRICK L. SOLAN
vs.
CH., MIL. & ST. PAUL R'Y CO., Appellant. } Appeal from Sioux District Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $12.75, and that execution issue therefor."

50½ And afterwards there were filed in the office of the clerk of said court a petition for writ of error, writ, bond, citation, and assignment of errors, true copies of which have been retained in the office of said clerk, and the originals are attached to this transcript as a part of the return to said writ.

51 In the Supreme Court of Iowa.

PATRICK L. SOLAN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant. } Petition.

To the supreme judges of the State of Iowa:

Your petitioners represent that on the 31st day of May, A. D. 1895, there was rendered a decision in this court wherein Patrick L. Solan was appellee and The Chicago, Milwaukee & St. Paul Railway Company was appellant, by which decision the judgment of the court below was affirmed, wherein judgment was rendered against appellant for the sum of one thousand dollars and costs on account of injuries sustained by appellee by reason of alleged negligence on the part of appellant.

Your petitioner further represents that it desires to take the opinion of the Supreme Court of the United States upon the questions therein involved, and that the constitutionality of certain statutes of the State of Iowa under the Constitution and laws of the United States is involved in said decision and judgment, and your petitioner

therefore asks that a writ of error be allowed in said cause, whereby the same may be reviewed upon error in the Supreme Court of the United States; and your petitioner asks that a stay of execution may be had during the pendency of said cause in the Supreme Court of the United States, and that a supersedeas bond be fixed in such sum as may be reasonable and just to secure the payment of said judgment and costs.

GEO. E. CLARKE,
Attorneys for Appellant.

BURTON HANSON,
Gen'l Sol. C., M. & St. P. R'y Co., of Counsel.

[Endorsed:] Filed Aug. 7, 1895. C. T. Jones, clerk supreme court.

52 In the Supreme Court of Iowa.

PATRICK L. SOLAN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Burton Hanson and George E. Clarke, attorneys for C., M. & St. P. R'y Co.
W. D. Boies, attorney for plaintiff.

Assignment of Errors.

Comes now the Chicago, Milwaukee & St. Paul Railway Company and assigns error upon the decision and final judgment rendered in this cause in the opinion and decision filed herein by the judges of the supreme court of Iowa on the 31st day of May, A. D. 1895, as appears upon the face of the record in said decision and judgment in the following particulars, to wit:

I. It is provided by section 8 of article I of the Constitution of the United States that Congress shall have power to regulate commerce among the several States, and in said decision the supreme court of Iowa held and decided that section 1308 of the Code of Iowa is a limitation upon the right of the defendant to limit by contract the liability which attaches to it as a common carrier of persons and property in transporting the same from a point in the State of Iowa to a point in the State of Illinois and a limitation upon the right of the defendant to make the contract under which the plaintiff was being transported at the time he was injured, which contract was admitted in evidence on the trial of this cause, as appears by the record herein.

II. The court erred in holding and deciding that section 1308 of the Code of Iowa, as applied to the contract under which the plaintiff was being transported at the time he was injured and
53 which was admitted in evidence on the trial of said cause, was not a regulation of commerce between the States, and for that reason the said contract was void under said section 1308 of the Code of Iowa.

III. The court erred in holding and deciding that the plaintiff Solan was not barred by the contract under which he was being transported at the time he was injured, which contract appears in the record herein, from recovering from the defendant for the personal injuries which he received while being transported under said contract any sum greater than five hundred dollars, the amount specified in said contract.

IV. The court erred in holding and deciding that the defendant could not exempt itself from liability to the plaintiff to the extent and in the manner provided for in the contract under which plaintiff was being transported at the time he was injured, which contract was received in evidence on the trial of this cause and appears in the record herein.

V. The court erred in refusing to decide that said section 1308 of the Code of Iowa is unconstitutional and void, as regulating commerce among the States, when applied to the contract under which the plaintiff was being transported at the time of the injury, which contract was received in evidence on the trial of this cause and appears in the record herein.

VI. The court erred in refusing to decide and hold that, notwithstanding section 1308 of the Code of Iowa, the defendant had the right to limit by contract its liability for damages on account of injuries which the plaintiff sustained while being transported under the contract in question, which contract was received in evidence on the trial of this cause and appears in the record herein.

54 VII. The court erred in refusing to decide and hold, notwithstanding section 1308 of the Code of Iowa, the defendant had the right to limit by contract its liabilities for injuries to persons and property while transporting such persons and property from a point within the State of Iowa to a point within the State of Illinois.

And thereupon, upon the foregoing assignment of errors, the said Chicago, Milwaukee & St. Paul Railway Company respectfully ask and pray that upon the writ of error granted upon its petition and for the review of the errors herein assigned that the said judgment and decision of the supreme court of Iowa may be reversed, and the action, decision, and judgment of the said supreme court of Iowa may be set aside; and said Chicago, Milwaukee & St. Paul Railway Company will ever pray.

GEO. E. CLARKE,
Att'y C., M. & St. P. R'y Co.

BURTON HANSON, *Of Counsel.*

Filed Aug. 7, 1895.

C. T. JONES,
Clerk Supreme Court.

54½ [Endorsed:] 17075. Patrick L. Solan *vs.* C., M. & St. P. R'y Co. Petition for writ and assignment of errors. Filed Aug. 7, 1895. C. T. Jones, clerk supreme court. Sub., Jan., '95; ab., Jan. 30, '94; op., May 31, '95; writ, &c., Aug. 7, '95.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Patrick L. Solon, plaintiff, and Chicago, Milwaukee & St. Paul Railway Co., def't, wherein was drawn in question the validity of certain statutes of the State of Iowa, to wit, sec. 1308 of the Code of Iowa, as affecting the right and power of said defendant to limit by contract the extent of its liability under contracts for shipment and transportation of persons and property from one State into and through another State, and said decision being in favor of the validity of the said statutes, a manifest error hath happened, to the great damage of the said Chicago, Milwaukee and Saint Paul Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceeding- aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Seal U. S. Circuit Court, Southern District Iowa.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 7 day of August, A. D. 1895.

EDWARD R. MASON,
Clerk U. S. C. C., Southern District of Iowa.

Allowed:
JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] 17075. Patrick L. Solan *vs.* C., M. & St. P. R'y Co.

56 *Appeal Bond to Supreme Court.*

In the Supreme Court of Iowa, — Term, 189–.

PATRICK L. SOLON
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

Know all men by these presents that we, Chicago, Milwaukee & St. Paul Railway Co., as principal, and Ambrose A. Call, as surety, are held and firmly bound unto Patrick L. Solon in the penal sum

of three thousand dollars; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and assigns, firmly by these presents.

Dated this 7th day of August, A. D. 1895.

The condition of this bond is such that whereas the said Chicago, Mil. & St. P. R'y Co. has sued out a writ of error from the supreme court of the State of Iowa to the Sup. Court of the United States from the judgment or order of the supreme court of the State of Iowa, made at the May term of said court, May 31, A. D. 1895, in a certain cause in said court wherein Patrick L. Solon is plaintiff and C., M. & St. P. R'y Co. is defendant:

Now, if the said C., M. & St. P. R'y Co. shall pay all costs and damages that shall be adjudged against it and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court of the U. S. may render or order to be rendered by the court, not exceeding in amount or value the original judgment or order, and shall prosecute its said writ of error to effect, and if it shall fail to make its plea good it shall answer all damages & costs, then this obligation to be void; otherwise to be and remain in full force.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., *Principal*,
By GEO. E. CLARKE, *Its Att'y.*
AMBROSE A. CALL, *Surety.*
WM. K. FERGUSON.

STATE OF IOWA, }
Kossuth County, } *ss:*

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of five thousand dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of — dollars.

AMBROSE A. CALL.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of five thousand dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of — dollars.

WM. K. FERGUSON.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of — dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of — dollars.

— —.

Sworn to before me and subscribed in my presence by the said Ambrose A. Call & Wm. K. Ferguson this 7th day of August, A. D. 1895.

[Notarial Seal of Geo. E. Clarke, Kossuth County, Iowa.]

GEO. E. CLARKE,
Notary Public.

STATE OF IOWA, } ss:
Kossuth County, }

I, B. F. Crose, clerk of the district court of Kossuth county, Iowa, do hereby certify that I am personally acquainted with Ambrose A. Call and Wm. K. Ferguson and with the financial standing and responsibility of each of said sureties, and that the within bond is good and ample, and that if the same was presented to me I would have no hesitancy in approving the same.

Witness my hand and seal, at Algona, Iowa, this 7th day of August, A. D. 1895.

[Seal of the District Court, Kossuth Co., Iowa.]

B. F. CROSE,
Clerk District Court.

[Endorsed:] No. 17075. Appeal bond. Patrick L. Solon *vs.* C., M. & St. P. R'y Co. Filed Aug. 7, 1895. C. T. Jones, clerk supreme court. The within bond approved by me this 7th day of August, 1895. Josiah Given, ch. justice sup. court, Iowa.

57 *Citation.*

To Patrick L. Solan and to W. D. Boies, his attorney:

Whereas the Chicago, Milwaukee & St. Paul Railway Company have lately sued out a writ of error to the Supreme Court of the United States from a judgment and decision lately rendered in the supreme court of Iowa in favor of Patrick L. Solan, and the said Chicago, Milwaukee & St. Paul Railway Company have filed the security required by law and perfected its said writ of error, you are therefore hereby cited to appear before the Supreme Court of the United States, at the city of Washington, on the second Monday of October next, 1895, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Des Moines, Iowa, on the 7th day of August, A. D. 1895.

JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

SHELDON, IOWA, *Aug. 8th*, 1895.

Due & legal service accepted of the foregoing order & citation.

W. D. BOIES.
PATRICK L. SOLAN,
By W. D. BOIES, *His Attorney.*

[Endorsed:] 17075. Patrick L. Solan *vs.* C., M. & St. P. R'y Co. Filed Aug. 19, 1895. C. T. Jones, clerk supreme court.

58 STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, decision of the supreme court of Iowa, and final judgment rendered

in a cause entitled Patrick L. Solan *vs.* The Chicago, Milwaukee and St. Paul Railway Company.

And I further certify that I have retained in my office true and correct copies of petition for writ of error, the writ, bond, citation and assignment of errors, and the original of the same are hereto attached and returned herewith as a part of the return to said writ and this return is made in obedience to said writ of error.

I also transmit herewith an order made by the judge who allowed the writ, directing that the time for making return be extended to Oct. 1, 1895.

In testimony whereof witness my signature and official seal Sept. 24, 1895.

[Seal of the Supreme Court of Iowa.]

C. T. JONES,
Clerk Supreme Court of Iowa.

Endorsed on cover: Case No. 16,071. Iowa supreme court. Term No., 73. The Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, *vs.* Patrick L. Solan. Filed October 21, 1895.